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M E M O R A N D U M

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To Our Clients and Friends

Re: Interagency Advisory on Federal Court Decision on Safe Harbor Protection for Financial Institutions Filing Suspicious Activity Reports

The Federal Reserve Board, the Federal Deposit Insurance Corporation, the Financial Crimes Enforcement Network, the National Credit Union Administration, the Office of the Comptroller of the Currency and the Office of Thrift Supervision (the “Agencies”) have issued an advisory on a recent federal court decision, *Whitney Nat’l Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004), that reaffirms the safe harbor protection provided to financial institutions filing Suspicious Activity Reports (SARs). The decision also indicates what bank information may be protected from discovery. While this particular case pertains to a national bank, the Agencies believe that the court’s rulings apply to all financial institutions that file SARs in accordance with prescribed Agency regulations.¹

The Agencies and the Treasury Department generally require financial institutions to file SARs with law enforcement and bank supervisory authorities whenever the institutions know or suspect suspicious transactions or potential criminal activity. Federal law and regulation contain a safe harbor that protects the financial institution and its employees, officers and directors from liability for filing a SAR or for making disclosures in a SAR.

In *Whitney*, individuals filed a defamation suit against a bank, claiming that the bank wrongfully accused them of illegal lending activity when it filed a SAR. The plaintiffs sought discovery of any oral or written communications the bank may have

¹ Securities brokers and dealers are also required by Treasury regulations to file SARs.
See 31 C.F.R. § 103.19.

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had with law enforcement concerning their suspected illegal conduct and the filing of the SAR.²

The court ruled that a bank may not produce documents or information in discovery evidencing:

- the existence or contents of a SAR;
- communications to governmental agencies pertaining to the filing of a SAR or its contents;
- communications with government authorities that led to the filing of a SAR or in preparation for the filing of a SAR;
- communications that follow the filing of a SAR intending to explain or clarify the SAR; or
- the existence or content of oral communications to authorities regarding suspected or possible violations of laws or regulations that did not lead to the filing of a SAR.

The court also held that the bank is required to produce documents that the bank may have generated or received in its ordinary course of business pertaining to the defendants' banking activities, transactions and accounts, unless producing these documents could reveal whether an SAR had been prepared or filed.

The Interagency Advisory can be found at http://www.schwartzandballen.com/whats_new.html.

If you have any questions concerning this advisory, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.

² The individuals did not seek a copy of the SAR as the Bank Secrecy Act prohibits such disclosure to the people who are reported in the SAR.